

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC -9 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0235-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
WELLINGTON SPENCER COPPESS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20020885

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Wellington S. Coppess

Tucson
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Wellington Coppess petitions this court for review of the trial court's denial of his successive petition for post-conviction relief brought pursuant to Rule 32, Ariz. R.

Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Coppess was convicted after a jury trial of second-degree murder, aggravated assault, aggravated driving under the influence of an intoxicant, leaving the scene of an accident involving death or serious injury, and criminal damage. The trial court sentenced him to a combination of presumptive, slightly mitigated, and aggravated prison terms totaling 44.5 years. We affirmed his convictions and sentences on appeal. *State v. Coppess*, No. 2 CA-CR 2003-0355, ¶ 30 (memorandum decision filed Feb. 28, 2006). Coppess then sought post-conviction relief pursuant to Rule 32, asserting his trial counsel had been ineffective and his right to a fair and impartial jury had been violated. The trial court summarily denied relief, and we denied relief on review. *State v. Coppess*, No. 2 CA-CR 2007-0303-PR (memorandum decision filed Mar. 25, 2008).

¶3 In June 2010, Coppess filed a second notice of post-conviction relief, asserting his attorney had failed to seek preclusion of evidence of blood draws based on our supreme court's decision in *Carillo v. Houser*, 224 Ariz. 463, 232 P.3d 1245 (2010). The trial court appointed counsel, who filed a memorandum pursuant to Rule 32.4(c) stating he had not found any errors not previously raised that would entitle Coppess to relief and requesting that Coppess be permitted to file a supplemental petition for post-conviction relief. Coppess then filed a pro se supplemental petition arguing his first Rule 32 counsel had failed to review a medical report adequately and thus had not "argue[d] the issue correctly in [his] previous Rule 32." He additionally asserted his trial counsel

had been ineffective in failing to “investigate and defend [police] claims . . . that [he had been] hiding under a car” before his arrest.¹

¶4 The trial court summarily denied relief, concluding Coppess’s claims were precluded pursuant to Rule 32.2. It determined that his claim of ineffective assistance of Rule 32 counsel was an improper attempt to “bootstrap[]” a claim already raised “to a new ineffective assistance of counsel claim” and that his second claim regarding trial counsel’s failure to investigate was precluded because Coppess had not raised it in his first post-conviction proceeding.

¶5 On review, Coppess reasserts the same claims and argues neither claim is precluded because each is based on newly discovered material facts pursuant to Rule 32.1(e) and, relevant to his second claim that his indictment was based on perjured testimony, such a claim may be raised at any time. Because Coppess did not raise these arguments in the trial court, we do not address them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider issues raised for first time on review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court . . . which the defendant wishes to present” for review).

¶6 And the trial court did not err in summarily rejecting the claims Coppess did raise below. His first claim that his Rule 32 counsel had been ineffective is not a cognizable claim under Rule 32; as a non-pleading defendant, he has no constitutional

¹Coppess did not raise in his petition the claim based on *Carillo* mentioned in his notice of post-conviction relief.

right to effective representation in a Rule 32 proceeding. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011). His second claim plainly is precluded pursuant to Rule 32.2 because he did not raise it in his first post-conviction proceeding despite raising other claims of ineffective assistance of counsel. *See Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002) (“The ground of ineffective assistance of counsel cannot be raised repeatedly.”).

¶7 For the reasons stated, we grant review but relief is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge